David Clark, d/b/a Centurion *and* Mary Bieri. Case 8–CA–23219

September 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 20, 1991, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, David Clark, d/b/a Centurion, Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Nancy Recko, Esq., for the General Counsel.
David Clark, of Akron, Ohio, for the Respondent; *Brian J. Williams, Esq.*, of Akron, Ohio, on Respondent's brief.
Mary Bieri, of Akron, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The charge filed in this case by Mary Bieri, an individual, on November 16, 1990, was served on David Clark, d/b/a Centurion (the Respondent), by certified mail on the same date. A complaint and notice of hearing was issued on December 19, 1990. In the complaint it was alleged that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging five employees because they participated in a work stoppage on August 31, 1990.

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The matter came on for hearing on February 27, 1991, at Akron, Ohio. Each party was afforded full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF RESPONDENT

At all times material, the Respondent has been owned by David Clark, sole proprietorship doing business as and trading under the name of Centurion, with an office and place of business in Akron, Ohio (the Respondent's facility), and has been engaged in the nonretail processing and delivery of letters and packages.[1]

Annually, the Respondent, in the course and conduct of its business operations described above, provided services valued in excess of $50,000 for other enterprises within the State of Ohio, including Allstate Insurance Company and Sears, Roebuck and Co., and the United States Postal Services, enterprises who are themselves engaged in commerce on a direct basis.

The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The Discharges of Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, and Jeffrey Bieri*

During the night shift of August 3, 1990, at approximately 3–3:30 a.m., the above-named employees of the Respondent walked off their jobs and engaged in a work stoppage. In respect to this incident the Respondent made the following entries on the payroll status changes of the employees.

On the ''Payroll Status Change'' (effective date 8/30/90) of Steven L. Tipton was entered ''walked out at lunch and didn't return. He was considered as quitting—did not rehire.'' On the ''Payroll Status Change'' (effective date 8/30/90) of Mary Carol Bieri was entered ''Mary walked out at lunch and didn't come back August 31, 1990. Considered having quit did not rehire''; on the ''Payroll Status Change'' (effective date 8/30/90) of Jeffrey Bieri was entered ''Jeff walked out at lunch. Didn't come back. August 31, 1990. Considered quit—did not rehire''; and on the ''Payroll Status Change'' (effective date 8/30/90) of Ronald B. Deitrick was entered ''Ron walked out at lunch 8-30 and didn't come back. He has been considered having quit. We did not rehire.''[2] All payroll status changes were marked ''resignation'' except the status payroll change of Mary Bieri.

These entries were the result of the following series of events.

For some time prior to August 30, 1990, the above-named employees had registered complaints against Supervisor Carol Lynne Gabel. A major complaint involved the speed at which a conveyor belt was set. Employees claimed that it was set so fast that they were unable to keep up with it. Consequently, the magazines which traveled on the conveyor belt were strewn on the floor. Employees also complained that the operation was understaffed, the workplace was, at

[1] ''The company operates as a service bureau wherein customers can have their first and third class mail presorted to obtain a discount postage. In addition, they label magazines for bulk rate purposes.'' (R. Br. 5.)

[2] The first sentence of these entries was written by Production Manager Timothy Alan Calhoun; the latter sentence was added by Manager David M. Horning.

times, cold,[3] and they were subject to verbal abuse. Although these complaints were registered with Gable and Calhoun, they were not resolved to the employees' satisfaction.[4] On the night before the walkout, the four employees discussed the situation. They decided not to walk out but give Gabel ''another chance'' to see if she would turn down the conveyor.[5]

The next night, which was the night of the walkout, the ''conveyor was even moving a little bit higher than what it had been''; ''she just refused to do anything about it. And we finally decided to—we had to do something about it.'' The four employees again discussed the situation and decided to walk out at 3 a.m. and return to the plant the next day at 9 a.m. to discuss their complaints.[6]

On the next morning, the four employees returned to the plant at 9 a.m. They met with Production Manager Calhoun and Manager Horning ''to tell them . . . exactly the reason we left, tell them exactly what Carol's [Gabel] behavior was . . . .'' Horning testified that the employees were given ''an opportunity to explain why they walked out. . . . The only reason they gave was they felt they had to work too hard. . . . [T]hey were asked to leave.''

According to Mary Bieri, she related to Calhoun and Horning the incidents involving Gabel's speeding up the conveyor belt and the ''things were going all over the floor.'' The discussion ended by Calhoun saying, ''All of you get the hell out'' and Horning added, ''Yea get the fuck out.'' Tipton remembered that Calhoun and Horning were told that Gabel was in a bad mood and screamed at the employees.[7]

Around 11 a.m., Deitrick and Tipton again returned to the plant and according to Calhoun ''[t]hey wanted . . . to talk to Carol about getting their jobs back.'' Gabel testified that the meeting lasted about ''Two, maybe three hours.'' She further testified that she told the employees ''they could come back to work if they could explain to [her] why they walked out when they did.'' According to Gabel, ''[t]hey didn't know'' their reason for leaving.

Tipton testified, ''I just told them about how the machine was running clear high . . . and how she was being nasty to us that night.'' Gabel responded, ''if you can't come up with a better reason than that, than just go.'' In regard to the walkout, Tipton said, ''I just told them that we was trying to just tell them that there was a problem and we just wanted to straighten it up.'' Deitrick told Gabel and Calhoun at the meeting that ''there was no way we could keep up with the work. The conveyor was going extremely too high'' and ''Carol . . . she'd cuss, she'd call people names.''

The meeting ended by Gabel saying, ''that unless we come with a legitimate reason as to why we left that night, to her, that we could not have our jobs back.''

According to Calhoun, when he heard of the walkout[8] he considered the employees quitting[9] and did not hire them back ''because they had walked off.''[10]

Horning testified that the employees' reason for walking off, i.e., ''they felt they had to work too hard'' was not a good enough reason; and had they come up with an ''acceptable'' reason they would have been rehired.

The work records of the above-named employees reveal that they were good employees, with no verbal or written warnings in their files.

During the week that Calhoun had substituted for Gabel there had been no problems about speedup. Calhoun said, ''[W]e did good as a team, we were putting out a lot of work.''

B. *Conclusions and Reasons*

In its brief the Respondent asserts that the ''respondent had the legal authority to discharge the five affected employees with or without cause.'' This legal conclusion is contra to the provisions of the Act and harks back to the days before the Act was enacted when employers operated without the Act's restraints. While under some circumstances an employer may discharge an employee for a good reason, a bad reason, or no reason at all, an employer may not discharge employees for engaging in concerted activities protected by Sections 7 and 8(a)(1) of the Act, as occurred in this case,[11] even though their employment is deemed at will and regardless of the law of the State of Ohio on which the Respondent seems to rely. Such defense is not well taken, nor are the other defenses of the Respondent well taken, i.e., the General Counsel failed to meet his burden of proof, the employees were not engaged in concerted activity, several of the employees were in their probationary periods of employment, and the employees by walking out engaged in a ''mutiny.'' Indeed, it would appear from the Respondent's brief that it has abandoned, as a defense, its claim that the employees quit. Had the Respondent insisted on such defense, it would have been at odds with the credited evidence in this case, for the credited evidence supports the finding by a preponderance of all the evidence that the above employees were fired for engaging in a protected walkout. Not only did Respondent treat the incident as a walkout but referred to it as a walkout. Moreover, when the employees returned the next day to resolve the grievance with the idea of returning to work, the Respondent could not have avoided the conclusion that the employees had not quit but had walked off their jobs as a protest against their working conditions. Thus, I find,

[3] On one night, when it was around 32 degrees, Tipton asked Gabel to close the garage doors. Gabel refused.

[4] ''Once again, the machine was turned up. It seemed like it was even a little bit higher than what it had been the previous week—or the two weeks before that. And once again we tried to talk to her and she wouldn't do anything about it and she would use vulgar language . . . . She would say like the fuck word. . . .''

[5] ''Well, we was hoping that we could get it across to her that, you know, the magazines were falling off the rack—off the conveyor. And, you know, you'd think she'd get the message sooner or later and she just didn't.''

[6] Tipton testified, ''we left because of the way we were treated that night. . . . [W]e was just trying to prove a point. That there was a problem there.'' Mary Bieri testified, ''we did what we did, so Mr. Clark [the owner] might hear about it.'' (Mary Bieri had previously tried to reach Clark but had been unsuccessful.)

[7] Tipton testified, ''Tim told us just the get the hell out and don't come back.''

[8] According to Gabel, she called Horning at his home and told him that everyone but Donna Davis had ''walked out and left.'' Horning testified that Gabel had phoned him about 3:45 a.m.

[9] Calhoun testified that after talking to the employees in the morning ''we . . . figured that they had just quit. That's why they walked out.'' Horning testified, ''[The] decision [that the employees voluntarily quit] was made, basically, when I got the phone call at 4:30 in the morning. The only conclusion that I could come to was that they walked off the job, they don't want to work here any more. They did not come back.''

[10] After it was suggested by the Respondent that Calhoun had misunderstood the question, Calhoun modified his answer by adding, ''Well there are other circumstances.''

[11] See *Sun City Center Corp.*, 299 NLRB 549 (1990); *Seminole Mfg. Co.*, 272 NLRB 365 (1984).

based on the record as a whole and the credited evidence, that the employees did not quit but exercised their Section 7 rights to walk off their jobs in protest of their working conditions, for which conduct they were discharged. In adopting the procedure which the employees did, the employees were protected from their Employer's discharge by Sections 7 and 8(a)(1) of the Act. See *NLRB v. Washington Aluminum Co.*, 170 U.S. 9 (1962). See also *Seminole Mfg. Co.*, supra.

Accordingly, by discharging Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, and Jeffrey Bieri, the Respondent violated Section 8(a)(1) of the Act.[12]

C. *The Discharge of Juanita Cope*

Juanita Cope, who was employed by the Respondent as a driver[13] and was discharged by the Respondent on September 1, 1990. Her ''Payroll Status Change'' read, ''Juanita left work without permission from her supervisor. Based on her poor attendance record, and inadequate job performance her employment was terminated.''

Cope, who was under the supervision of Gabel, spoke also to Calhoun about the problems employees were experiencing on Gabel's shift.

Cope complained to Calhoun about Gabel's conduct the next day after Gabel had refused to close the garage doors. When Cope reported to work that night Gabel called her in the office. Gabel was very angry and asked Cope why she called Calhoun instead of her. Gabel told Cope the next time she had a problem to call her instead of Calhoun.

On another occasion Cope let some magazines fall on the counter. Gabel yelled, ''If you don't clean up your fucking attitude around here, you can get the hell out and take your goddamn sister with you.[14] As far as I am concerned your driving days are over.'' Cope reported the incident to Calhoun stating that Gabel had ''talked to [her] like a dog.'' Calhoun told Cope she was still a driver.

When Cope arrived for work on August 30, the night of the walkout, she informed Gabel that she would work until the mail run was finished, which would be around 3 a.m. She explained that her daughter had just had a baby with medical problems and that her mother had been sick as a result of which Cope had no sleep for 3 days. Gabel did not respond. Cope completed the run and left.

The next morning, after Cope had learned of the walkout, she phoned Calhoun to find out whether she should report to work. Calhoun told her to report for work. Cope reported for work at 11 a.m., at which time she greeted Calhoun.

Cope began sorting mail with Donna Davis, the only other employee who had not joined the walkout. During discussion with Davis, Davis said, ''It's not like you didn't know what they were going to do last night.''

After Cope had completed her run, Gabel approached her and said, ''As far as I am concerned this is your last damn night here. . . . You're not driving anymore. You can finish out the night or leave now, I don't give a damn. Because you're not going to stand here and tell me you didn't know they weren't going to walk out of here last night.'' Cope clocked out and left.

Horning testified that Davis had told him that she had been approached by Cope who told her that the employees were going to walk out on Wednesday or Thursday and asked her to join them.[15]

According to Calhoun, they had reason to believe that Cope was part of the walkout. Calhoun testified that he believed Cope was the ringleader of the walkout based on information he had received from Davis.

According to Calhoun he told Gabel to talk with Cope and if Cope could demonstrate that she was not involved in the walkout she could continue work.

Gabel testified that she knew that Cope was involved in the walkout. When Gabel was asked why Cope was discharged she replied, ''Well, I know she was involved in the walkout.''

The General Counsel's prima facie clearly establishes that Cope was discharged because the Respondent believed she had engaged in the walkout and was its ringleader. Although the Respondent claims that Cope was discharged for leaving work without permission, poor attendance, and inadequate job performance, none of these alleged shortcomings were brought to Cope's attention in reference to a probable discharge. Moreover, apparently prior to the time Calhoun learned that Cope was allegedly connected with the walkout he advised her that she could return to work. It was only after she returned to work that she was discharged. Additionally when she was discharged the only reason suggested for the discharge was her alleged connection with the walkout. Nothing was said about any other shortcomings of Cope. I find that if Cope had not been believed to have been connected with the walkout she would not have been discharged. See *Wright Line*, 251 NLRB 1083 (1980). I discredit the reasons advanced by the Respondent for the discharge of Cope. The credited testimony supports a finding that Cope was discharged because the Respondent believed that she was connected with the walkout which was protected concerted activity.

Accordingly, by the discharge of Cope on September 1, 1990, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the policies of the Act to assert jurisdiction here.

2. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1).

3. By unlawfully discharging Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, and Jeffrey Bieri on or about August 31, 1990, for engaging in protected concerted activities and by discharging Juanita Cope on or about September 1,

[12] I am convinced, and so find, that had these employees not exercised their Sec. 7 rights as detailed, they would not have been separated from employment. Cf. *Wright Line*, 251 NLRB 1083 (1980).

[13] Cope sorted the mail until the 11 a.m. break. After the break she drove a truck to the Akron Post Office where she picked up the mail for Allstate Insurance Company and delivered it to Allstate. Cope would then return to the Respondent's premises and resume mailsorting . On Sundays she made two mail trips.

[14] Mary Bieri is Cope's sister.

[15] It was stipulated, had Davis been called as a witness, she would have testified. ''[T]hey came and talked to me about walking out. I didn't think it was right or fair, so I didn't go. . . . [T]hey don't deserve the money for walking out.''

1990, for suspected engagement in protected concerted activities, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having also found that the Respondent unlawfully dicharged Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, Jeffrey Bieri, and Juanita Cope and has failed and refused to reinstate them in violation of the Act, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that the Respondent offer the above-named persons immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, dismissing, if necessary, any employees hired on or since the date of their discharges to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's acts here detailed, by payment to them of a sum of money equal to the amount they would have earned from the date of their unlawful discharges to the date valid offers of reinstatement, less their net interim earnings during such periods, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, David Clark, d/b/a Centurion, Akron, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully discharging or disciplining employees for engaging in concerted activities, including a walkout protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, Jeffrey Bieri, and Juanita Cope immediate reinstatement to the former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Akron, Ohio, copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully discharge or discipline our employees for engaging in concerted activities, including a walkout, protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, Jeffrey Bieri, and Juanita Cope immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Mary Carol Bieri, Steven L. Tipton, Ronald Deitrick, Jeffrey Bieri, and Juanita Cope that we have removed from our files any reference their discharge and that the discharge will not be used against them in any way.

DAVID CLARK, D/B/A CENTURION